IN THE SUPREME COURT OF MISSOURI

STATE EX REL. FIRSTPLUS HOME LOAN OWNER TRUSTS 1998-1 and 1998-2	)
Relators,	)
vs.	)
THE HONORABLE DAVID W. RUSSELL, CIRCUIT JUDGE,	)
Respondent.	)

Case No. SC 85037

BRIEF OF RELATORS FIRSTPLUS HOME LOAN OWNER TRUSTS 1998-1 AND 1998-2

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STATEMENT OF THE GROUNDS FOR THIS COURT'S JURISDICTION

This is a proceeding for an original writ of prohibition. This Court has jurisdiction under Article V, § 4.1 of the Missouri Constitution, which gives this Court the power to issue original remedial writs. A writ is appropriate in the present case to prevent the circuit court from exceeding its jurisdiction, and further to serve "the orderly and economical administration of justice," because there is "no adequate remedy by appeal" from the circuit court's order in the underlying case. *E.g., State ex rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 861, 862-63 (Mo. 1986); *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. 1994); *State ex rel. Hilker v. Sweeney*, 877 S.W.2d 624, 628 (Mo.1994).

STATEMENT OF FACTS

Plaintiffs filed the underlying case, *Danita Couch, et al. v. SMC Lending, Inc., et al.*, No. CV100-4332 CC (Circuit Court of Clay County, Missouri), on June 29, 2000 against, among others, defendant SMC Lending, Inc., a California corporation. (Order Certifying Plaintiff Class, p.3; A4). Plaintiffs alleged that SMC Lending made second mortgage loans to plaintiffs and a class of others similarly situated, and charged them origination fees or other closing costs beyond those allowed by Missouri's Second Mortgage Loan Act ("SMLA"), R.S. Mo. § 408.231 *et. seq.* ("SMLA"). (*Id.*, A2-5). Plaintiffs sought to recover the allegedly excessive fees and costs, all interest paid on their loans, forfeiture of any additional interest for the life of their loans, punitive damages and attorneys' fees. (*Id*.) Plaintiff Danita Couch alleged that she obtained her second mortgage loan from SMC Lending on September 10, 1997. (*Id.*; p.1, A2).

On January 3, 2002, more than four years after Ms. Couch took out her loan, plaintiffs first amended their petition to add relators FirstPlus Home Loan Owner Trusts 1998-1 and 1998-2 as defendants in the underlying action.[1] (Ex. A to Petition for Writ of Prohibition, Motion for Judgment on the Pleadings, p. 2, ¶ 4; A024-25). Relators are investor-owned Delaware business trusts that purchase packages of loans in the secondary market. (Petition for Writ of Prohibition, ¶¶ 1-2; admitted in Answer of Respondent to Petition for Writ of Prohibition, ¶ 2). Because plaintiffs' loans were among those the relator trusts purchased, and based on that fact, plaintiffs allege that relators are "derivatively" liable for SMC Lending's alleged violations of the SMLA. (Answer of Respondent to Petition for Writ of Prohibition, p. 7, ¶ E).

Plaintiffs do not allege that there is any relationship between relators and the loan originator, SMC Lending, beyond the fact that relators bought loan packages that included some loans initially originated by SMC Lending. (Petition for Writ of Prohibition, ¶ 2; admitted in Answer of Respondent to Petition for Writ of Prohibition, ¶ 2).

Relators answered the amended petition and pleaded the statute of limitations as a defense. (Petition for Writ of Prohibition, ¶ 4; admitted in Answer of Respondent to

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[1]Plaintiffs Nancy and David Beebe, who obtained a loan from SMC Lending on November 14, 1997, did not join as plaintiffs until the Fourth Amended Petition was filed on April 8, 2002. Their loan is owned by relator First Plus Home Loan Owner Trust 1998-2.

Petition for Writ of Prohibition, ¶ 4). On November 21, 2002, relators moved for judgment on the pleadings in accordance with Rule 55.27(b), based on the expiration of the 3-year statute of limitations for actions on a statute for a penalty or forfeiture where the action is given to the party aggrieved, R.S. Mo. § 516.130(2). (Ex. A to Petition for Writ of Prohibition, Motion for Judgment on the Pleadings; A024).

Plaintiffs opposed relators' motion. Although they agreed that this is "an action upon a statute for a penalty or forfeiture," they nevertheless argued that the applicable statute of limitations is R.S. Mo. § 516.420, which provides for a six-year limitations period when the defendants in such actions are "moneyed corporations." (Ex. A to Relators' Reply in Support of Petition for Writ of Prohibition, plaintiffs' Bench Brief Regarding Application of a 6-Year Statute of Limitations; A027-36).

Relators' motion was heard and decided on December 11, 2002, in conjunction with plaintiffs' motion for class certification. The trial court overruled relators' motion and held that the applicable statute of limitations was § 516.420, the six-year statute. (Docket sheet entry for 12/11/02 and Order, pp. 3-5; A001, 004-6). The trial court also certified the case as a class action, and entered an Order to that effect prepared by plaintiffs' counsel. (*Id.*).

The underlying action is only one of a number of similar "second mortgage" cases in Missouri's courts.[2] In one of the other cases, *McLean v. First Horizon Home Loan*

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[2]The other cases include: *Baker v. Century Financial Group, Inc.,* No. CV100-4294CC (Clay County) (in this Court, *State ex rel. Master Financial Asset Securitization*

Corp., No. 00 CV 228530, the Honorable Marco A. Roldan, Circuit Judge of Jackson County, stated that he would apply the *three-year* statute of limitations set forth in § 516.130(2), rejecting plaintiffs' argument that § 516.420 should apply. (Ex. C to Petition for Writ of Prohibition, Order dated December 17, 2002, p. 11 and email from Judge Roldan's clerk; A039-43).[3]

Trust v. Russell, No. SC85081); *Gilmor v. Preferred Credit Corp*., No. CV100-4263-CC (Clay County); *Adkison v. FirstPlus Bank*, No. CV100-3174-CC (Clay County); *Schwartz v. Bann-Cor Mortgage, Inc*., No. 00CV226639-02 (Jackson County); *McLean v. First Horizon Home Loan Corp*., No. 00CV228530 (Jackson County); *Beaver v. US Bank*, No. 00CV215097 (Jackson County); *Hall v. American West Financial*, No. 00CV218553 (Jackson County); *Scherich v. Premier Associates Mortgage Co*., No. 01CV201263 (Jackson County); and *Avila v. Community Bank*, No. 01CV215815 (Jackson County; currently on appeal in the Western District Court of Appeals, No. WD-61568). In addition, there are or have been three second mortgage cases in the Twenty Second Circuit (St. Louis City): *Jackson v. American Home Funding, Inc.*, No. 012-01117 (dismissed for lack of personal jurisdiction); *Burgess v. Samboy Financial, Inc.*, No. 012-01020 (dismissed for lack of personal jurisdiction) and *Turner v. Ditech Funding, Inc.*, No. 012-1314 (pending).

[3]Judge Roldan's clerk sent an email to plaintiffs' counsel asking them to draw an order (1) certifying a class, and (2) applying a three-year statute of limitations. (A039). While the resulting Order did not explicitly mention the statute of limitations, it defined

Relators sought a writ of prohibition from the court of appeals, which denied relators' petition. However, on March 4, 2003, this Court granted preliminarily relators' petition and entered an Order prohibiting Respondent from taking any other action in the underlying case pending final proceedings in this Court.

POINTS RELIED ON

I. RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM APPLYING THE SIX-YEAR STATUTE OF LIMITATIONS SET FORTH IN R.S. MO. § 516.240 BECAUSE THE APPLICABLE STATUTE OF LIMITATIONS IS R.S. MO. § 516.130(2), IN THAT THE UNDERLYING ACTION IS ONE FOR A PENALTY OR FORFEITURE BROUGHT BY THE PARTY AGGRIEVED, RELATORS ARE NOT MONEYED CORPORATIONS, AND EVEN IF SMC LENDING IS A MONEYED CORPORATION (WHICH IT IS NOT), THERE IS NO BASIS FOR "DERIVATIVELY" APPLYING THE SIX-YEAR STATUTE OF LIMITATIONS TO CLAIMS AGAINST RELATORS. Principal Authorities Relied On:

State ex rel. Noranda Aluminum, Inc. v. Rains, 706 S.W.2d 861, 862 (Mo. 1986)

Division of Labor Standards v. Walton Const. Mgmt. Co., Inc., 984 S.W.2d 152 (Mo. Ct. App. W.D. 1999)

Nolan v. Kolar, 629 S.W.2d 661, 663 (Mo. Ct. App. E. D. 1982)

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the class to include persons who obtained a second mortgage "on or after November 16, 1997," which was three years before the *McLean* action was filed. (A041)

Sansone v. Sansone, 586 S.W.2d 87, 89-90 (Mo. Ct. App. E.D. 1979)

R.S. Mo. § 516.130

R.S. Mo. § 516.420

II. RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM PROCEEDING WITH THE UNDERLYING ACTION UNTIL HE GRANTS RELATORS' MOTION FOR JUDGMENT ON THE PLEADINGS, BECAUSE PLAINTIFFS' CLAIMS AGAINST RELATORS ARE BARRED BY THE APPLICABLE THREE-YEAR STATUTE OF LIMITATIONS, R.S. MO. § 516.130(2), IN THAT (A) PLAINTIFFS' LOANS WERE MADE MORE THAN THREE YEARS BEFORE RELATORS WERE JOINED AS DEFENDANTS IN THE ACTION, (B) PLAINTIFFS' CLAIMS ARE NOT "CONTINUING," (C) THE CLAIMS AGAINST THE RELATOR TRUSTS DO NOT RELATE BACK TO THE ORIGINAL FILING OR THE NAMING OF ANY OTHER DEFENDANT, (D) THE FACT THAT PLAINTIFFS PLEADED A DEFENDANT CLASS ACTION DOES NOT AFFECT THE RUNNING OF THE STATUTE OF LIMITATIONS, AND (E) THE FIVE-YEAR STATUTE OF LIMITATIONS, R.S. MO. § 516.120(5), DOES NOT APPLY.

Principal Authorities:

Miller v. Pacific Shore Funding, 224 F.Supp.2d 977, 996 (D. Md. 2002)

Dash v. FirstPlus Home Loan Trust 1996-2, __ F.Supp.2d ___, 2003 WL 1038355 (M.D.N.C. 2003)

Windscheffel v. Benoit, 646 S.W.2d 354 (Mo. 1983)

Meadows v. Pacific Inland Securities Corp., 36 F.Supp.2d 1240 (S.D. Cal. 1999)

Mo.R.Civ.P. 55.33(c)

ARGUMENT

I. **RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM APPLYING THE SIX-YEAR STATUTE OF LIMITATIONS SET FORTH IN R.S. MO. § 516.240 BECAUSE THE APPLICABLE STATUTE OF LIMITATIONS IS R.S. MO. § 516.130(2), IN THAT THE UNDERLYING ACTION IS ONE FOR A PENALTY OR FORFEITURE BROUGHT BY THE PARTY AGGRIEVED, RELATORS ARE NOT MONEYED CORPORATIONS, AND EVEN IF SMC LENDING IS A MONEYED CORPORATION (WHICH IT IS NOT), THERE IS NO BASIS FOR "DERIVATIVELY" APPLYING THE SIX-YEAR STATUTE OF LIMITATIONS TO CLAIMS AGAINST RELATORS.** ***Standard of Review***

The issue of the appropriate statute of limitations is a question of law, *Yahne v. Pettis County Sheriff Dep't*, 73 S.W.3d 717, 719 (Mo. Ct. App. W.D. 2002); *Harris-Laboy v. Blessing Hospital, Inc.*, 972 S.W.2d 522, 524 (Mo. Ct. App. E.D. 1998) which this Court reviews *de novo*. *Yahne*, 73 S.W.3d at 719; *Stronger ex rel. Stronger v. Riggs*, 85 S.W.3d 703, 705 (Mo. Ct. App. W.D. 2002).

A. A Permanent Writ is an Appropriate Remedy for This Case. This Court held in *State ex rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 861 (Mo. 1986), that a writ of prohibition may issue to serve "the orderly and economical administration of justice," such as where there is "no adequate remedy by appeal." *Id.* at 862-863 (citing

Mo. Const. art. V, § 4.1). Thus, prohibition will lie when there is an important question of law decided erroneously that would otherwise escape review by the appellate courts, and the aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision. *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. 1994) (prohibition allowed to address whether discovery is available in contempt proceedings); *State ex rel. Hilker v. Sweeney*, 877 S.W.2d 624, 628 (Mo.1999) (writ issued to review the trial court's decision to allow a plaintiff to amend his complaint to include untimely claims).

This case fits *Noranda Aluminum* perfectly. Relators are defendants in multi-faceted class action that will likely take two or more years to resolve. There may well be over 200 depositions, as there will need to be inquiry into each class members' loan transactions, in addition to motion practice and preparation for what promises to be a lengthy trial.[4] Even if relators are ultimately vindicated on the limitations issue, it will come only after enormous resources have been expended. Reviewing the trial court's decision now will save the resources of everyone involved and will ensure that effective

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[4]The trial court certified a class of all persons who obtained second mortgage loans from defendant SMC Lending from and after June 29, 1994. In addition to SMC Lending, relators FirstPlus Home Loan Owner Trusts 1998-1 and 1998-2 and two of their trustees, other defendants include Homecomings Financial, GMAC-Residential Funding Corporation and Home Loan Trust 2000.

justice is carried out. Even plaintiffs "agree[] that having this Court now decide the statute of limitations issue makes sense."[5]

Forcing relators to litigate a high-stakes class action based on an erroneous statute of limitations ruling would surely be the sort of "considerable hardship and expense" to which this Court referred in *Chassaing* in discussing when a writ is appropriate.

B. The Court Erred in Holding that the Claims Against Relators Are Governed by a Six-Year Statute of Limitations. All parties agree that plaintiffs' claims, which arise under the Second Mortgage Loan Act, are claims based upon a statute for a forfeiture; the principal relief sought is the forfeiture of all interest paid and to be paid for the remainder of the life of the loans. *See* R.S. Mo. § 408.236. The parties further agree that the action is given to "the party aggrieved" – *i.e.*, plaintiffs below. Because the claim is a statutory claim for a penalty or forfeiture, it is governed by the three-year statute of limitations contained in § 516.130(2):[6]

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[5]Plaintiffs' Answer to Petition for Writ of Prohibition, p. 2.

[6]R.S. Mo. § 516.400 also applies a three-year limitations period to "actions upon any statute for any penalty or forfeiture, given in whole or part to the party aggrieved." The only difference between § 516.400 and § 516.130(2) is that the limitations period in § 516.400 runs from "the commission of the offense," whereas the limitations period in § 516.130(2) runs from the date the damage is sustained and is capable of ascertainment. R.S. Mo. § 516.100. For the purposes of the present action, there is no need to decide *which* of the three-year statutes of limitations applies.

516.130. What actions within three years, –

(2) An action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state.

Here, plaintiffs are the "part[ies] aggrieved," so on its face, § 516.130(2) governs. *Julian v. Burrus,* 600 S.W.2d 133, 141 (Mo. Ct. App. W.D. 1980) (§ 516.130(2) held applicable to action for return of allegedly usurious interest).

As this Court stated in *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 19-20 (Mo. 1995), "statutes of limitation are favored in the law and cannot be avoided unless the party seeking to do so brings himself strictly within a claimed exception." Plaintiffs are trying to fit themselves within the narrow exception carved out by § 516.420, which allows six years for "suits against moneyed corporations...to recover any penalty or forfeiture." The trial court found that SMC Lending is a "moneyed corporation" and ruled that the statutory claims against both SMC Lending *and* the relator trusts are governed by § 516.420. The trial court was wrong on both counts.

1. Relators FirstPlus Home Loan Owner Trusts 1998-1 and 1998-2 Are Not "Moneyed Corporations." Missouri statutes do not define "moneyed corporation," and this Court has not addressed the issue. However, the parties agree that the court of appeals accurately defined the term in *Division of Labor Standards v. Walton Construction Management Co., Inc*., 984 S.W.2d

152 (Mo. Ct. App. W.D. 1999).[7] In *Walton Construction*, the court of appeals observed that what is now § 516.420 was imported from the Revised Statutes of New York, and therefore, in interpreting the statute, "recourse to New York law is appropriate." *Id.* at 155. The court of appeals quoted from *Mutual Insurance Co. of Buffalo v. Erie County Sup'rs*, 4 N.Y. 442, 444 (N.Y. 1851), in which the New York Supreme Court defined a "moneyed corporation" as "every corporation having banking powers, or having the power to make loans upon pledges or deposits, or authorized to make insurance." *Id.* The court of appeals adopted that definition verbatim in *Walton Construction*. *Id.* at 156.

Here, plaintiffs have not alleged, and there is no evidence, that relators fit within any part of the "moneyed corporation" definition of *Walton Construction*. First, plaintiffs allege that relators are "trusts," not corporations at all, and the circuit court erred by ignoring the plain language of the statute, which by its terms applies only to corporations.[8] For example, the circuit court stated in the underlying *Baker* action:

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[7]*See, e.g.,* Suggestions in Opposition to Petition for Writ of Prohibition, No. SC85037, at. 25 (quoting definition from *Walton Construction*).

[8]Relators are governed by 12 Del. Code § 3801 et seq., which defines a "business trust" as "an unincorporated association which is created by a governing instrument...." 12 Del. Code § 3801(a). Relators are bound by the terms of their governing instruments. 12 Del. Code § 3801(f). For example, the 1998-1 Trust's governing instrument is a Trust Agreement dated February 1, 1998 (Exhibit 27 to Suggestions in Opposition to Petition

> These trusts, [handling money is] what they're all about and thus, I find that they are within the definition of moneyed corporations and thus, they do fall within the six-year statute of limitations and thus, the motion for summary judgment is going to be denied.

(Transcript of Proceedings, Exhibit D to Petition for Writ of Prohibition, p. 22; A047). Contrary to the circuit court's off-the-cuff conclusion in *Baker*, trusts and corporations are separate and distinct entities, and there is simply no basis for the circuit court to have disregarded basic tenets of the law of business organizations.

There is nothing to suggest that when the Legislature said "corporations" in § 516.240, it meant to include "trusts." To the contrary, business trusts have been recognized for nearly a century, *e.g.*, *Hecht v. Malley*, 265 U.S. 144, 146-47 (1924), and if the Legislature intended § 516.240 to apply to "moneyed corporations, *business trusts or other associations*," it would have said so. *E.g.*, *Ryder Student Transportation Services, Inc. v. Director of Revenue*, 896 S.W.2d 633, 635 (Mo. 1995) (courts "cannot resort to canons of construction to add words to the statute that are not there"); *Bridges v. Van Enterprises*, 992 S.W.2d 322, 325 (Mo. Ct. App. S.D. 1999) ("express mention [by Legislature] of one thing implies the exclusion of another").

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for Writ of Prohibition; A051-060). Relators are able to sue or be sued and are to be treated as "grantor trusts" for federal income tax purposes. (*Id.*, p. 5, § 2.06; A060).

Second, relators do not fit the other parts of the *Walton Construction* test. They do not accept or make loans upon deposits or pledges. Indeed, relators do not make loans at all – they buy packages of already-issued loans on the secondary market.[9] Finally, no party contends that relators are "authorized to make insurance." Relators do not meet any part of the *Walton Construction* test, and therefore § 516.420 should not be applied to the claims against them.

2. There is No Basis for "Derivatively" Applying the Six-Year Statute of Limitations to Relators, Because SMC Lending is Not a Moneyed Corporation and, in Any Event, Relators are Entitled to Have the Claims Against Them Governed by Their Own Statute. The trial court held that even if the relator Trusts are not "moneyed corporations," R.S. Mo. § 516.420 nonetheless governs the claims against them because the loan originator, SMC Lending, is supposedly a moneyed corporation, and because relators are alleged to be somehow "derivatively liable" for SMC Lending's statutory violations. The trial court's conclusion is wrong for two reasons: SMC Lending does *not* fit the definition of a "moneyed corporation," but even if

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[9]Section 2.03 of relators' Trust Agreements set forth the powers of the trusts. They are allowed to issue securities in the form of notes and certificates, buy packages of loans made by others, transfer the trust estate to the trustee and distribute moneys to the trust's investors, and pay expenses of the trust. The trusts are *not* authorized to accept deposits or make loans. (A059, Trust Agreement, p. 4).

it did, there is no basis for applying the same statute of limitations applicable to SMC Lending to the separate claims against relators here.

a. SMC Lending is not a Moneyed Corporation. Applying the *Walton Construction* definition to SMC Lending leads to the conclusion that *it* is not a moneyed corporation. While SMC Lending, unlike relators, is at least a corporation, it meets none of the other tests articulated in *Walton Construction*.

First, all parties agree that SMC Lending is not "authorized to make insurance." Second, although SMC Lending made mortgage loans on real estate, it does not make "loans upon pledges or deposits." There is neither an allegation nor evidence that SMC Lending accepts or makes loans upon deposits, and a mortgage – a security interest in real estate – is clearly distinct from a pledge, which is a possessory security interest in personal or intangible property. *See, e.g., Sansone v. Sansone*, 586 S.W.2d 87, 89-90 (Mo. Ct. App. E.D. 1979).[10]

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[10]In *Sansone*, plaintiffs sued to set aside a sale of stock that had been pledged as security for two notes, arguing that R.S. Mo. § 516.150 barred actions to foreclose a mortgage or deed of trust after the underlying obligation has been barred by the statute of limitations. The court held that the statute applied to a mortgage, but not to a pledge. The court referred to *Williams v. Rorer*, 7 Mo. 556, 558 (1842) and the Restatement of the Law, Security § 1, which defined a "pledge" as "a security interest in a chattel or in an intangible represented by an indispensable instrument, the interest being created by a bailment for the purpose of securing the payment of a debt or the performance of some

Third, SMC Lending does not have "banking powers." Plaintiffs argue that SMC Lending has "banking powers" because it can make loans secured by real estate, something the Missouri banking statute, R.S. Mo. § 362.105(1), allows banks to do: "[banks and trust companies may] conduct the business of . . . loaning money upon real estate . . .". Plaintiffs' argument is, therefore, that because SMC Lending can also make loans on real estate, and banks can make loans on real estate, SMC Lending must have "banking powers" and is, therefore, a "moneyed corporation."

But plaintiffs' argument proves too much, because under Missouri law, *any* corporation can loan money secured by real estate. *See* R.S. Mo. § 351.385: "*Each corporation* shall have power . . . (8) to invest its surplus funds . . . and to lend money and take and hold real . . . property as security for the payment of funds so invested or loaned." (italics added). Plainly, as the court of appeals held in *Walton Construction*, it was not the Legislature's intent that *every* for-profit corporation be considered a moneyed corporation; if it was, the Legislature would have said so. *Walton Construction*, 984 S.W.2d at 156.

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other duty." The court also noted that "at common law there was a definite distinction between a mortgage and a pledge, and...to ascertain the intention of the legislature we must presume that it was aware of the distinction. *Person v. Scullin Steel Company*, 523 S.W. 2d 801 (Mo. banc 1975). Therefore, when the legislature enacted the first clause of § 516.150, which made reference only to mortgages and deeds of trust, it did not provide and apparently did not intend that the provisions of that statute apply to pledges." *Id*. at 89.

The far more reasonable interpretation is that the "banking powers" reference is to corporations that are subject to Missouri's laws governing banks. For example, New York codified its definition of moneyed corporation as: "a corporation to which the banking law or the insurance law is made applicable by the provisions of such laws." N.Y. Gen.Const. Law § 66(9); *see also Hartford Accident & Indemnity Co. v. Peat, Marwick, Mitchell & Co.*, 494 N.Y.S.2d 821, 823 (N.Y. Sup. 1985), *aff'd* 507 N.Y.2d 602 (N.Y.A.D. 1986) (applying definition from § 66(9)).[11] Here, however, there is neither an allegation nor evidence that SMC Lending is governed by any of Missouri's banking laws.

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[11]Similarly, New York defines "moneyed corporation" in its General Corporation Law, sec. 3, subd. 6, as "a corporation formed under or subject to the Banking Law or the Insurance Law." *E.g.*, *In re Thomas Estate*, 209 N.Y.S.2d 230, 231 (N.Y. Surr. Ct. 1960). In *Retailers Collateral Security Trading Corp. v. State of New York*, 176 N.Y.S.2d 429 (App. Div. 1958), plaintiff wanted to change its name to include the word "finance," but the Secretary of State would not approve the change because New York law provided that only moneyed corporations could use the word "finance" in their names. The appellate division affirmed the Secretary of State, holding that a moneyed corporation was a corporation "subject to the banking laws," and even though plaintiff made loans, it was not "subject to the Banking Law to the same degree that organizations formed thereunder are," and so it did not qualify as a moneyed corporation. *Id.* at 430-31.

Plaintiffs rely on *Fielder v. Credit Acceptance Corp.*, 19 F.Supp.2d 966 (W.D. Mo. 1998), as authority for the proposition that the six-year statute properly applies. However, *Fielder* is distinguishable in that the lender there – an auto finance company that loaned on car titles – was clearly engaged in "lending . . . upon pledges." The same is true of the other case on which plaintiffs relied in the circuit court, *Hobbs v. National Bank of Commerce*, 96 F. 396, 398 (2d Cir. 1899), in which the Court noted that the lender in that case "had power to make loans upon pledges or deposits," and thus fit squarely within the definition of a moneyed corporation.

Under *Walton Construction*, even if relators were subject to the same statute of limitations as SMC Lending (which they are not), the trial court erred in applying the six-year statute because even SMC Lending is not a "moneyed corporation."

b. Even if SMC Lending is Characterized as a Moneyed Corporation, There is No Basis for Applying the Six-Year Statute of Limitations to Relators, Which Are Not.

The trial court held that the six-year statute of limitations applied to claims against relators because they are alleged to somehow be "derivatively liable" for SMC Lending's statutory violations. This holding is plainly wrong and cannot support the circuit court's decision to apply the six-year statute.

There is no basis for applying a single statute of limitations to every defendant in the case, especially where, as here, the limitations period varies depending on the particular defendant's status. For example, in *Nolan v. Kolar*, 629 S.W.2d 661 (Mo. Ct. App. E. D. 1982), the court applied the six-year statute of limitations to statutory claims

against a bank, but held that the three-year statute of limitations applied to claims against the individual defendants. *Id*. at 663. *Nolan* clearly illustrates the proposition that the Court should separately evaluate the applicable statute of limitations for the claims against each defendant. Doing so in the present case results in the conclusion that the claims against relators are governed – and hence barred – by the three-year statute, § 516.130(2).

To support their "derivative" limitations theory, plaintiffs have suggested – but not alleged – that the relator trusts are liable for SMC Lending's actions by reason of agency, alter ego or respondeat superior. Any such allegation would be frivolous. Relators do not own SMC Lending. They do not control SMC Lending. They do not even do business directly with SMC Lending; all relators did is buy, not from SMC Lending, but from another entity not related to either SMC Lending or relators, packages of mortgage loans that included some that SMC Lending originated. There is no basis under Missouri law for automatically subjecting relators to whatever statute of limitations may govern SMC Lending.

Plaintiffs rely on the Home Owners Equity Protection Act ("HOEPA"), 15 U.S.C. § 1641(d)(1). But HOEPA does not extend the statute of limitations on state law claims. First, HOEPA says only that an assignee of a HOEPA mortgage[12] is "subject to all claims

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[12]HOEPA applies to "high cost" mortgage loans, which the statute defines by reference to a number of factors. Plaintiffs have asserted that many, but by no means all, of the subject loans are HOEPA loans.

and defenses with respect to that mortgage that the consumer could assert against creditor of the mortgage." The statutory language says nothing about what statute of limitations applies to state law claims against an assignee – and in fact, under HOEPA, the applicable statute of limitations is *one* year. 15 U.S.C. § 1640(e).

Second, plaintiffs cannot rely on HOEPA to create "derivative" liability under state law, because HOEPA does no such thing. *E.g., Dash v. FirstPlus Home Loan Trust 1996-2*, __ F.Supp.2d ___, 2003 WL 1038555 at *10 & n. 13 (M.D.N.C. 2003) (rejecting idea that HOEPA makes assignees responsible under state law for the acts of the loan originator: "[HOEPA] is not intended to bestow any rights upon the borrower nor constitute an independent basis of liability" (citing *In re Rodrigues*, 278 B.R. 683, 688 (Bankr. D. R.I. 2002); *In re Murray*, 239 B.R. 728, 733 (Bankr. E.D.Pa. 1999); *Vandenbroeck v. ContiMortgage Corp.*, 53 F.Supp.2d 965, 968 (W.D. Mich.1999); *Dowdy v. First Metropolitan Mortgage Co.*, 2002 WL 745851 (N.D. Ill. 2002) (stating that "this court does not believe that [HOEPA] entitles plaintiffs to new rights or claims that would not otherwise be cognizable under the law," and dismissing consumer fraud claims against assignee)). At most, HOEPA removes any holder-in-due-course defense that otherwise might be available under state law. *Id.*

Third, plaintiffs have affirmatively *denied* making any claim against relators based on HOEPA. For example, when defendants removed the underlying case to federal court because of HOEPA preemption, plaintiffs moved to remand, arguing:

> [HOEPA] appears nowhere in Plaintiffs' "well-pleaded complaint," and it is not an element, essential or otherwise, of Plaintiffs' state law claims.

> Rather, it is mentioned in Plaintiffs' Motion for Leave [to amend] to establish that [HOEPA] serves as a bar to a holder-in-due-course defense that an assignee defendant may raise.

(Exhibit E to Petition for Writ of Prohibition, Plaintiffs' Suggestions in Support of Motion to Remand, p. 5; A065). In fact, plaintiffs explicitly relied on *Vandenbroeck v. ContiMortgage*, 53 F.Supp.2d 965, 968 (W.D. Mich. 1999), in which the Court explained that HOEPA "does not bestow any new rights on the borrower; rather it eliminates the holder-in-due-course defense."

The federal court took plaintiffs at their word, stating:

> [T]he federal statute in question, 15 U.S.C. § 1641(d), is utilized by plaintiffs as an argument against an anticipated holder-in-due-course defense . . . § 1641(d) is not an essential element of plaintiffs' state law claims. The statute serves as a limitation on the common law, holder-in-course rule not as an independent basis for liability.

(Exhibit F to Petition for Writ of Prohibition, Order Granting Motion to Remand, November 8, 2001; A068-69). Having disclaimed affirmative reliance on HOEPA, plaintiffs cannot now use it to "derivatively" subject relators to the "moneyed corporations" statute of limitations under Missouri law.[13]

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[13]Plaintiffs also cited a handful of federal cases in the trial court, *none* of which holds that an assignee that acquires a mortgage is subject to the same statute of

Quite simply, there is no authority for plaintiffs' strained argument about a "derivative" statute of limitations. Even if the separate claims against SMC Lending are not time barred – which they are – relators are subject to a shorter limitations period, which ran well before plaintiffs added them to the action. The trial court erred by not

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limitations as the originating lender. *Bryant v. Mortgage Capital Resource Corp.*, 197 F.Supp.2d 1357, 1364-65 (N.D. Ga. 2002), merely holds that consumers had a right under HOEPA to assert claims against an assignee based on the mortgage lender's violation of state law. (*Dash, supra,* holds otherwise). *Cooper v. First Government Mortgage. & Inv. Corp.*, 238 F.Supp.2d 50 (D.D.C. 2002), simply recited the language from HOEPA quoted above. Neither *Bryant* nor *Cooper* said that HOEPA automatically makes the statute of limitations applicable to the originating lender applicable to a subsequent assignee.

Plaintiffs also cited *Miller v. Pacific Shore Funding*, 224 F.Supp.2d 977, 996 (D. Md. 2002), in which the court held that under Maryland law, SMLA claims against a mortgage company were barred by the general state statute of limitations and, therefore, so were the claims against the assignee of the mortgage. But there was no argument in *Miller* that any defendant was covered by a special or different statute of limitations. Further, the holding in *Miller* does not prove the converse, *i.e.*, that if the claims against the mortgage company were *not* time barred, neither would the claims against the assignees.

granting relators' motion for judgment on the pleadings based on the three-year statute of limitations.

II. RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM PROCEEDING WITH THE UNDERLYING ACTION UNTIL HE GRANTS RELATORS' MOTION FOR JUDGMENT ON THE PLEADINGS, BECAUSE PLAINTIFFS' CLAIMS AGAINST RELATORS ARE BARRED BY THE APPLICABLE THREE-YEAR STATUTE OF LIMITATIONS, R.S. MO. § 516.130(2), IN THAT (A) PLAINTIFFS' LOANS WERE MADE MORE THAN THREE YEARS BEFORE RELATORS WERE JOINED AS DEFENDANTS IN THE ACTION, (B) PLAINTIFFS' CLAIMS ARE NOT "CONTINUING," (C) THE CLAIMS AGAINST THE RELATOR TRUSTS DO NOT RELATE BACK TO THE ORIGINAL FILING, (D) THE FACT THAT THIS IS A CLASS ACTION DOES NOT AFFECT THE RUNNING OF THE STATUTE OF LIMITATIONS, AND (E) THE FIVE-YEAR STATUTE OF LIMITATIONS, R.S. MO. § 516.120(5) DOES NOT APPLY.

Standard of Review

The issue of the appropriate statute of limitations is a question of law, *Yahne v. Pettis County Sheriff Dep't*, 73 S.W.3d 717, 719 (Mo. Ct. App. W.D. 2002), which this Court reviews *de novo*. *Yahne*, 73 S.W.3d at 719; *Stronger ex rel. Stronger v. Riggs*, 85 S.W.3d 703, 705 (Mo. Ct. App. W.D. 2002).

Plaintiffs have raised, in their Suggestions in Opposition to Petition for Writ of Prohibition and in their Answer to the Petition for Writ of Prohibition, several arguments why, in their view, their claims against relators should not be dismissed even if the six-year statute of limitations does not govern. Plaintiffs did not raise most of these arguments in the circuit court, and therefore they are not properly before this Court. *See, e.g., State ex rel. Nixon v. Am. Tobacco Co., Inc.*, 34 S.W.3d 122, 129 (Mo. 2000) (an issue that was never presented to or decided by the trial court is not preserved for appellate review).[14] Nonetheless, because plaintiffs have raised these arguments in this Court, relators will address them.

A. Plaintiffs' Claims Against Relators are not Saved by the Continuing Violation Doctrine. Plaintiffs have asserted in their Answer to Petition for Writ of Prohibition that even if the three-year statute of limitations applies, their claims are timely because relators violate the SMLA each month by receiving repayment of a loan that included the allegedly unlawful fees or charges. But virtually every court that has considered this argument has rejected it, and this Court should do the same.

For example, plaintiffs in *Miller v. Pacific Shore Funding,* 224 F.Supp.2d at 989-90, made the same argument. The *Miller* court squarely rejected it:

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[14]The only one of these arguments that plaintiffs did raise in the Circuit Court is their "alternative" argument that if the six-year statute of limitations does not apply, then their action is governed by the five-year statute of limitations, R.S. Mo. § 516.120. This argument is addressed in section II.D., *infra*.

> The apparently punctuated charging, receipt and collection are no more than the lingering, ongoing, continuing aspects of a unitary action initiated more than three years ago. If, as [plaintiff] alleges, that action violates the SMLL, the violation has inflicted a single monetary injury whose amount increases steadily over time. "The wrong that continues over time," however, is "different from a wrong which comes into existence or becomes known only after a passage of time." [citation omitted]....More than three years before filing his suit, at the closing of the loan, [plaintiff] had sufficient knowledge of circumstances indicating he might have been harmed. The allegedly illegal fees were itemized on the face of loan documents he signed on that date. The continuing charging, collecting, and receiving of those fees by the lender or its assignees do not continuously renew the accrual of his cause of action. His claims are time-barred as a matter of law and must, therefore, be dismissed.

See also Faircloth v. National Home Loan Corp., ___ F.Supp.2d ___, 2003 WL 1232825 at *6 (M.D.N.C. March 17, 2003) (rejecting plaintiffs' argument and holding that statute of limitations began to run upon loan closing); *Dash v. FirstPlus Home Loan Trust 1996-2, supra,* 2003 WL 1038555 at *6, n. 12 (stating that "The Court rejects Plaintiffs' argument that the accrual date of Plaintiffs' claim would be extended by the continuous remittance of monthly payments . . . The accrual date . . . would have been . . . the date when the loan was closed").

B. Plaintiffs' Claims Against Relators are not Made Timely by the Doctrine of Relation Back. Plaintiffs also assert in their Answer to the Petition for Writ of Prohibition that because they sued U.S. Bank National Association within the three-year limitations period, their subsequent amendment to assert claims against the relator trusts related back to the date of the filing against U.S. Bank. Even if this Court is to consider this argument, it has no merit. First, under Mo.R.Civ.P. 55.33(c), an amendment relates back to the date of the original pleading if "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading" *and*:

> within the period provided by law for commencing the action against the party and serving notice of the action, the party to be brought in by the amendment: (1) has received such notice of the institution of the action as will not prejudice the party in maintaining the party's defense on the merits and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Mo.R.Civ.P. 55.33(c) (italics added).

Rule 55.33(c) does not save plaintiffs' claims against relators, for two reasons. First, the rule allows relation back only when *changing* a party, not when *adding* a party. *State ex rel. Hilker v. Sweeney*, 877 S.W.2d at 628; *Windscheffel v. Benoit,* 646 S.W.2d 354, 356-57 (Mo. 1983); *Caldwell v. Lester E. Cox Med. Ctr*., 943 S.W.2d 3, 8 (Mo. Ct. App. S.D. 1997); *Goodkin v. 8182 Maryland Associates L.P.,* 80 S.W.3d 484, 488-89

(Mo. Ct. App. E.D. 2002). Plaintiffs' Third Amended Petition did not change the named party from U.S. Bank National Association to FirstPlus Home Loan Owner Trusts 1998-1 and 1998-2; it plainly *added* the relator trusts as defendants. Second, there is no evidence in the record that the relator trusts had notice of the underlying action within the three-year limitations period.[15] Nor is there evidence that the relator trusts knew or should have known that plaintiffs intended to sue them before the three-year statute had run. Plaintiffs have failed to show that relation back under Rule 55.33(c) applies.

C. The Fact that Plaintiffs Pleaded a Defendant Class Action Did Not Toll The Running of the Statute of Limitations Against Relators.

Plaintiffs have also asserted that the limitations period was tolled because plaintiffs asked the court to certify a defendant class. Although one federal court has accepted such an argument, the overwhelming majority of courts have rejected it, and this Court should do so as well.

Plaintiffs rely on *Appleton Electric Co. v. Graves Truck Line, Inc.*, 635 F.2d 603, 609 (7th Cir. 1980), *cert. denied*, 451 U.S. 976 (1981), in which the court held that where a defendant class was ultimately certified, the statute of limitations was tolled as to each

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[15]There is absolutely nothing in the record to support plaintiffs' assertion in their Suggestions in Opposition to Petition for Writ of Prohibition, p. 36, that "relators received notice during the limitations period of the institution of this action and knew or should have known that it was [sic] an intended defendant."

member of the defendant class from when the complaint was filed until the defendant received notice of the action and chose to opt out.

The majority of the courts to consider this issue have, however, rejected *Appleton* and held that the limitations period is tolled as to members of a purported defendant class *only* to the extent that they receive actual notice of the action – and their status as purported class members – before the limitations period expires. *E.g., Carlson v. Independent Sch. Dist. No. 623*, 392 N.W.2d 216, 223 (Minn. 1986) (reversing court of appeals that followed *Appleton Electric* and holding that "the limitation statute is not tolled unless there was adequate notice" to unnamed class members); *In re Activision Sec. Litig.*, 1986 WL 15339 at *5 (N.D. Cal. 1986) (same); *Chevalier v. Baird Savings Ass'n*, 72 F.R.D. 140, 155 (E.D. Pa. 1976) (statute of limitation is not tolled against unnamed members of a defendant class until they are named in an amended complaint).

In *Meadows v. Pacific Inland Securities Corp.*, 36 F.Supp.2d 1240, 1248-49 (S.D. Cal. 1999), the Court specifically rejected *Appleton Electric* and held that, even though the filing of a *plaintiff* class action complaint tolled the statute of limitations as to absent plaintiff class members, the tolling rule could not be applied consistent with due process to unnamed members of a *defendant* class. To hold otherwise, the court stated, would unfairly deprive defendants of their right to be "notified of the substantive claims against them." *Id*. (quoting *In re Activision, supra,* 1986 WL 15339 at *2). The court in *Meadows* also noted that Professor Newberg recognized the "potential unfairness created by applying the class action tolling rule to [a] defendant class," but that such unfairness could be "eliminated by ensuring that the defendant class members receive some sort of

individual or other reasonable notice soon after the action is filed." *Id.* at 1249 n. 16 (quoting H. Newberg & A. Conte, *Class Actions*, § 4.53 at 205-06 (3d ed. 1992)).

The majority rule – which this Court should follow – is that pleading a defendant class action tolls the statute of limitations only where the members of the purported defendant class receive notice of the potential claims against them within the limitations period. Because there is nothing in the record here showing such notice, the tolling doctrine should not apply.

D. The Five-Year Statute of Limitations Does Not Apply. In a last-ditch effort to save their claims against the relator trusts, plaintiffs ask this Court to apply a separate five-year statute of limitations to their claims. This argument cannot be squared with what plaintiffs have said about the penal nature of the SMLA and the forfeiture remedies they are seeking, nor with the plain language of the SMLA.

Plainly plaintiffs have spent most of their time arguing that the six-year statute of limitations governs. As part of their argument, plaintiffs have repeatedly emphasized the fact that their SMLA claims seek "to recover [a] penalty or forfeiture imposed" by law. For example, plaintiffs stated in the Answer of Respondent to Petition for Writ of Prohibition (pp. 5-6) that:

> There can be no doubt that the instant MSLMA claims fall within the type of claims encompassed by § 516.240 as a MSLMA claim is plainly an action "to enforce any liability created by . . . any law . . ." Further, it is also a claim to "recover any penalty or forfeiture."

In their Suggestions in Opposition to the Petition for a Writ of Prohibition, plaintiffs said (p. 23):

> The Plaintiff Class seeks to "enforce a liability" and/or to recover a "penalty or forfeiture" imposed by Missouri law against and from SMC Lending, a second mortgage lender, and its various assignees, including Relators.

Further, plaintiffs' SMLA claims seek primarily a forfeiture of any "excessive" fees and all interest paid or to be paid in the future on the allegedly unlawful loans, as provided in R.S. Mo. § 408.236.[16] Plaintiffs' action is plainly one "upon a statute for a penalty or forfeiture," and therefore the limitations period is either three years (R.S. Mo. § 516.130(2)) or six years (R.S. Mo. § 516.240). Plaintiffs' "alternative" attempt to apply the five-year statute of limitations is a throw-away and should be treated as such.

CONCLUSION

For the reasons stated above, the preliminary writ should be made absolute.

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[16] *See, e.g.,* Suggestions in Opposition to Petition for Writ of Prohibition, p. 7.

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Certificate of Compliance with Mo. R. Civ. P. 84.06(b) and 84.06(g)

The undersigned certifies that the foregoing brief complies with the limitations contained in Mo. R Civ. P. 84.06(b) and, according to the word count function of Word Perfect by which it was prepared, contains 7,255 words, exclusive of the cover, Certificate of Service, this Certificate of Compliance, the signature block and the appendix.

The undersigned further certifies that the diskette filed herewith containing this Brief of Relators in electronic form complies with Mo. R. Civ. P. 84.06(g), because it has been scanned for viruses and is virus-free.

_____
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document and a floppy disk containing a copy of same, was sent via U.S. Mail, postage prepaid this 7th day of April, 2003 to:

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